Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies;	)	WT Docket No. 16-421
Mobilitie, LLC, Petition for Declaratory Ruling	)	

REPLY COMMENTS OF THE
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA

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April 7, 2017

The Board of Supervisors of Fairfax County, Virginia, files this Reply in response to the Comments of Crown Castle International Corporation and its subsidiaries ("Crown Castle"), to the extent that they directly criticize Fairfax County.[1] Crown Castle's Comments misstate facts about the County's permits, fees, and application processes. In fact, deployment of wireless networks has flourished in Fairfax County.[2] By any measure, Fairfax County, with its 99% approval record,[3] could not credibly be accused of prohibiting the provision of personal wireless services. No "fix" is necessary. Crown Castle's misleading version of the facts in this particular case raises questions as to the validity of its factual claims in general.

Crown Castle also has not identified any legitimate problems with deployment of its infrastructure in Fairfax County; any delays or hindrances are of its own making. It did not submit applications for multiple facilities simultaneously in one batch for one fee ("batched applications") when offered the opportunity;[4] it has not pursued the special exception applications it filed for new structures;[5] it has never had an application denied by Fairfax County.[6] Yet now it seeks the Commission's involvement, allegedly to create an "environment

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[1] Comments of Crown Castle International Corp., WT Docket No. 16-421 at 13–14, 18 (filed March 8, 2017) ("Crown Castle Comments").

[2] *See* Crown Castle Comments at 7 (observing that "deployment of advanced wireless networks has flourished in jurisdictions that have demonstrated an appreciation for the value of wireless services and that have taken steps to streamline network deployment").

[3] *See* Attach. 1, Declaration of Chris Caperton in Support of Reply Comments of the Board of Supervisors of Fairfax County, Virginia ("Caperton Declaration"), ¶ 8 (affirming that the County has denied only 4 of the 650 applications received from 2010 to 2016).

[4] Caperton Decl. ¶ 6.

[5] Caperton Decl. ¶ 10.

[6] Caperton Decl. ¶ 9.

that properly balances federal communications policy with state and local interests."[7] In reality, that "environment" would create only one result: evisceration of local zoning and siting authority. Because Crown Castle's position is at odds with the Communications Act, the County asks the Commission to disregard the petition and refrain from any further action in this docket.

I. Crown Castle asks the Commission to upend the balance between rapid deployment and local zoning authority.

In Section 704 of the Telecommunications Act of 1996[8] ("the Act"), Congress codified a "system based on cooperative federalism. *State and local authorities would remain free to make siting decisions.* They would do so, however, subject to minimum federal standards—substantive and procedural—as well as federal judicial review." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 127-128 (2005) (Breyer concurring) (emphasis added). Stated differently, Congress struck a balance between a national interest in accelerating deployment of telecommunications facilities and the local interest in zoning decisions over the specific siting of those facilities. *360 Commc'ns v. Bd. of Supervisors of Albemarle Cty.*, 211 F.3d 79, 86 (4th Cir. 2000).

This balance recognizes land use decisions as a "core function of local government," because they involve a proper balancing of complex factors, based on "knowledge of and sensitivity to local conditions." *Gardner v. City of Baltimore*, 969 F.2d 63, 67–68 (4th Cir. 1992). In most instances, land use and zoning decisions "properly rest with the community that is ultimately–and intimately–affected." *Id.* For the same reason, federal courts generally abstain from ruling on state or local land use and zoning questions. *Harper v. Pub. Serv. Comm'n*, 396 F.3d 348, 352 (4th Cir. 2005).

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[7] Crown Castle Comments at v.

[8] 47 U.S.C. § 332(c)(7).

If Congress had wished to grant the telecommunications industry unfettered access to local rights-of-way, it would have said so. Instead, because Congress is made up of representatives from jurisdictions across the country—jurisdictions with vastly different populations, geography, and telecommunications needs—it saw fit to preserve local authority over decisions regarding the placement, construction, and modification of personal wireless service facilities.[9]

Crown Castle's exclusive focus on its own business interests have blinded it to the balance Congress intended to strike. It boldly asks the Commission to strip localities of all zoning and siting authority.[10] Yet Crown Castle fails to recognize that it is but one of many telecommunications infrastructure providers. Mobilitie, a competitor, also seeks unregulated authority to install infrastructure in local rights-of-way. Several others already operate in Northern Virginia. Without any local authority to manage rights-of-way, they could be littered with infrastructure and other facilities in no time. Moreover, there is no guarantee that all the structures put up by speculators such as Mobilitie and Crown Castle will actually be used by telecommunications carriers.

At its core, Crown Castle's submission is premised on a mistrust of the marketplace. If Crown Castle is providing a needed service to localities and the citizens who live there, it should not need to ask the Commission to steamroll local zoning authority. Consumers should want the facilities. Local governments represent those consumers and will hear from them loud and clear

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[9] 47 U.S.C. § 332(c)(7)(A).

[10] Crown Castle Comments at 29 (asking the Commission to limit local authority to issuing construction or building permits).

if local laws stand in the way of services consumers want. If Crown Castle cannot "sell" its product to the buyers, that isn't the buyers' fault.

II. Crown Castle disregards Fairfax County's robust record of zoning approvals.

From 2010 to 2016, the County received over 650 telecommunications applications and denied only 4.[11] Fairfax County has not denied any Crown Castle applications.[12] In fact, all 5 of Crown Castle's applications for collocations on utility poles were accepted and approved within 14 to 25 days.[13] Despite Fairfax County's strong record, Crown Castle launches baseless complaints about County permits and fees. Crown Castle claims that "Fairfax County has established a Special Use Permit requirement for any new small cell node public installations in public rights-of-way."[14] Fairfax County's "Special Exception" permit is required for monopoles and other new freestanding structures. Co-locating small cell nodes on existing infrastructure, however, does not trigger the Special Exception requirement as long as facilities meet the requirements of Zoning Ordinance § 2-514.

Crown Castle makes passing mention of the County's application fee[15] and complains that the County has not established a process for submitting batched applications for multiple poles in a single application.[16] Fairfax County's Special Exception fee for new monopoles (approximately $16,000) is a reasonable estimate of costs incurred in reviewing and analyzing the application to meet all requirements of state law. The fee is not a revenue source. Moreover,

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[11] Caperton Decl. ¶ 8.

[12] Caperton Decl. ¶ 9.

[13] Caperton Decl. ¶ 9.

[14] Crown Castle Comments at 13-14.

[15] Crown Castle Comments at 14.

[16] Crown Castle Comments at 14.

Fairfax County staff offered Crown Castle the opportunity to submit batched applications and pay only a single fee.[17]

Crown Castle desires to erect new supporting structures in Tysons, which it correctly describes as "one of the densest communities in the Washington metropolitan area."[18] Crown Castle demands the right to place these new towers without regard to the County's carefully designed plan for the redevelopment of Tysons, which represents years of the local community's work to ensure that this district remains a livable and welcoming environment for residents and visitors. It is hard to imagine a more blatant attempt to invoke federal regulatory authority to defeat the intentions of the people who actually live and operate businesses in the area.

Because of the carefully thought-out Design Guidelines for Tysons contained in Fairfax County's Comprehensive Plan, installation of new structures in public rights-of-way is discouraged.[19] But contrary to Crown Castle's claims, such structures are not *prohibited.*[20] County staff met with Crown Castle representatives five times within the past year to answer questions and assist the company in locating facilities in the County, including in Tysons.[21] Crown Castle was encouraged to communicate with the Tysons Corner Land Use Task Force about design options, but it refused to do so.[22] Crown Castle is incorrect in representing that the County *required* it to apply to the Task Force; no such requirement exists.[23]

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[17] Caperton Decl. ¶¶ 6, 12

[18] Crown Castle Comments at 18.

[19] *See, e.g.*, Caperton Decl. ¶ 4.

[20] Crown Castle Comments at 18; Caperton Decl. ¶ 4.

[21] Caperton Decl. ¶ 4.

[22] Caperton Decl. ¶ 5.

[23] Caperton Decl. ¶ 5.

Further, Crown Castle claims that its tower applications, like other zoning matters, must be reviewed by the County's Planning Commission. According to Crown Castle, such review "could take up to six months."[24] Aside from extensions of time requested by applicants, the Planning Commission and Board of Supervisors complete their review of new facilities (i.e., monopoles) within less than 150 days, unless that time is extended by the applicant.[25] Co-locations benefit from an even more streamlined process; as noted above, the County approved Crown Castle's co-locations on existing poles within 14-25 days.

As Crown Castle admits, the Virginia legislature has already "adopted legislation that resolves many of these issues."[26] Unless Crown Castle can show that outstanding issues remain requiring Commission action—which it has not done so far—the company's claims provide no basis for any new federal regulations or interpretations.

III. Crown Castle improperly conflates Sections 332 and 253.

Crown Castle argues that the Commission should allow it to invoke 47 U.S.C. § 253 as well as the wireless provisions of § 332.[27] Of course, Crown Castle has no rights under § 253, since it does not provide any telecommunications service.[28] But even aside from this fact, we have already shown in our initial comments that § 253 cannot be used as a basis for Crown Castle's demands for regulatory favors. The Commission has no authority to regulate the use of

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[24] Crown Castle Comments at 14.

[25] Caperton Decl. ¶ 13.

[26] Crown Castle Comments at 14.

[27] Crown Castle Comments at 24–30.

[28] Comments of the Virginia Joint Commenters at 47 (filed March 8, 2017) ("Virginia Joint Comments")

local public rights-of-way under § 253.[29] Further, Crown Castle's attempt to conflate § 253 with § 332 fails: the two sections serve different purposes, because (among other reasons) wireless carriers do not have the same kind of need to use public rights-of-way that wireline carriers do.[30]

Nor can Crown Castle credibly argue that any inconvenience or cost it might encounter is a "prohibition."[31] As the saying goes, "You keep using that word; I do not think it means what you think it means."[32] "Prohibit" has a clear and distinct meaning. It is not equivalent to "restrict" or to "impose costs by refusing to give away an asset for free." Crown Castle's attempt to claim discrimination also fails. The company appears to argue that it must be given special treatment, *different* from that of other wireless companies, to avoid discrimination.[33] In other words, it argues *for* discrimination, as long as that discrimination is in its favor. Section 253 cannot be used to bolster Crown Castle's fallacious arguments.

IV. The Commission's advance Notice of Proposed Rulemaking indicates an unsettling adoption of industry comments without regard for legitimate rebuttal.

Since initial comments were filed, the Commission has proposed to issue a Notice of Proposed Rulemaking (NPRM) on the matters addressed in the Public Notice. Because the

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[29] Virginia Joint Comments at 38–52, 63. *See generally* Comments of Smart Communities Siting Coalition at 51–69 (filed March 8, 2017); Comments of the National League of Cities, the National Association of Telecommunications Officers and Advisors, the National Association of Towns and Townships, the National Association of Counties, the National Association of Regional Councils, and the Government Finance Officers Association at 16–26 (filed March 8, 2017); Frederick E. Ellrod III & Nicholas P. Miller, *Property Rights, Federalism, and the Public Rights-of-Way*, 26 Seattle U. L. Rev. 475 (2003), *available online at* Seattle U. L. Rev.

[30] Virginia Joint Comments at 45–47, 52–53, 58–60.

[31] *See, e.g.*, Crown Castle Comments at 31–32.

[32] The Princess Bride (Act III Commc'ns & Twentieth Century Fox Film Corp. 1987).

[33] *See, e.g.*, Crown Castle Comments at 29.

Commission is already proposing rules,[34] without even waiting for the reply comments in this proceeding, Fairfax County has grave concern that the Commission has already made up its mind. The NPRM indicates that the Commission is willing to accept and act on the allegations already made by industry commenters, even if those claims might yet be rebutted by replies from representatives of localities that are elected by local communities.

In an earlier proceeding covering much the same ground, the Commission betrayed a similar willingness to accept wireless industry accusations at face value, even when those claims were deliberately disguised to prevent effective rebuttal.[35] Such an approach violates the notion of due process and calls into question the basic principles of administrative law. Government by anecdote—imposing onerous regulations on communities who have been deprived of a fair chance to respond—is the antithesis of the concept of the due process dictates of open comment and objective decision-making on which the administrative state relies.[36]

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[34] *See* advance copy for tentative consideration at the Commission's April open meeting, Notice of Proposed Rulemaking and Notice of Inquiry, FCC-CIRC1704-03, *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Revising the Historic Preservation Review Process for Wireless Facility Deployments*, WT Dockets No. 17–79 and 15–180 (released March 30, 2017); FCC Announces Tentative Agenda for April Open Meeting (March 30, 2017).

[35] *See* Declaratory Ruling, FCC 09-99, *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT Docket No. 08-165 at ¶ 68 (2009).

[36] Chairman Pai recently criticized "regulation by anecdote": "[A]s Susan Dudley, George W. Bush's regulatory czar once noted, 'Anecdotes about outcomes we don't like do not indicate market failure, nor do they present a sufficient argument for government intervention.'" Remarks of FCC Chairman Ajit Pai at the Hudson Institute, "The Importance of Economic Analysis at the FCC" (April 5, 2017).

In another context, the Commission observed that "[b]asic notions of fairness generally require that materials that are available to some participants in the proceeding should be available to all." Order, FCC 15-110, *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer*

(continued next page)

Some industry commenters are employing similar practices in the current proceeding to shield their allegations from rebuttal. But the Commission takes the automatic acceptance of industry claims to a new level when it moves ahead with proposed rules before it even considers rebuttals and weighs their merit. New rules adopted by such means is the paradigm case of arbitrary and capricious action by federal regulators.

It may be objected that a notice of proposed rulemaking merely starts another cycle of comments. But endless cycles of comments, addressing repeated demands for the same regulatory favors, are not without cost.[37] Incumbent telecommunications companies can, and do, spend large sums on lobbying to improve their profit margins—money that could better be spent on improving their networks. Local communities—which must shoulder far wider responsibilities, such as public safety and economic development—cannot spend so freely on federal regulatory processes. By advancing the same claims over and over, seeking the same

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Control of Licenses and Authorizations, MB Docket No. 15-149 at ¶ 14 (2015). Similarly, all participants in a proceeding should have a full and fair opportunity to address any alleged facts the Commission takes into consideration in making new rules.

[37] Local communities had to mobilize to fend off unnecessary federal regulation on these matters not only in 2009, as noted above, *see* n. 35 *supra*, but again in 2011. *See* Notice of Inquiry, FCC 11-51, *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59 (2011). At that time, local communities warned that the Commission would require "an additional and specific grant of authority" to take the proposed actions: "Telecommunications Act of 1996, P.L. No. 104-104, 101 Stat. 56, § 601(c) (noting that the law does not modify, impair, or supersede State and local laws except as specifically provided therein)." Comments of the National League of Cities, the National Association of Counties, the United States Conference of Mayors, the International Municipal Lawyers Association, the National Association of Telecommunications Officers and Advisors, the Government Finance Officers Association, the American Public Works Association, and the International City/County Management Association in WC Docket No. 11-59 at 53 & n.169 (filed July 18 2011). There is no reason local communities should be required to remind the Commission of this principle every few years.

types of regulatory benefits, the industry can hope to wear out its opponents and win by attrition what it cannot legitimately prove.

The Commission's rush to impose new, onerous regulations at the behest of the regulated industry stands in sharp contrast to its attitude toward regulations disfavored by the industry.[38] On one hand, Commissioners celebrate the reversal of rules designed to protect consumers, and they declare that oversight of the communications industry must be confined strictly to the bounds of the Commission's legal authority.[39] The Commission is cautioned to avoid recklessness in areas "where it clearly lacks expertise, personnel, or understanding."[40] Yet when it comes to new, intrusive regulations that benefit the industry, the Commission seeks to expand its legal authority beyond all reasonable bounds and to constitute itself as a national zoning board, despite its lack of "expertise, personnel, or understanding" in zoning.

Fairfax County applauds the idea of staying within the boundaries of proper legal authority and of avoiding regulation in areas where the Commission lacks the necessary expertise. It is the discrepancy between the Commission's statements about restraint, and its rush to expand its regulatory power in this proceeding, that would be arbitrary and capricious.

CONCLUSION

For all of these reasons, Fairfax County asks the Commission to refrain from taking any action in this docket.

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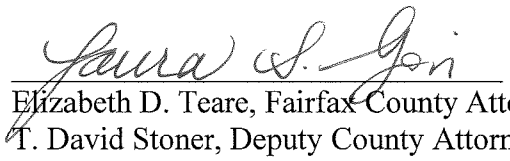
[38] *See* Virginia Joint Comments at 71.

[39] *See, e.g.*, Statement of FCC Chairman Ajit Pai on President Trump Signing Into Law the Congressional Resolution of Disapproval (April 3, 2017); Statement of FCC Chairman Ajit Pai on the Latest D.C. Circuit Rebuke of FCC Overreach (March 31, 2017); Statement of Commissioner Michael O'Rielly on Court Rejection of FCC Anda Order (March 31, 2017)

[40] Statement of Commissioner Michael O'Rielly on the Release of the Broadband Consumer Privacy Proposal Fact Sheet and Circulation of Item (March 10, 2016).

Respectfully submitted,



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DECLARATION OF CHRIS CAPERTON
IN SUPPORT OF REPLY COMMENTS OF THE
BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA

I, Chris Caperton, declare as follows:

1. I submit this Declaration in support of the Reply Comments of the Board of Supervisors of Fairfax County, Virginia, in response to the Comments submitted by Crown Castle International Corporation and its subsidiaries (Crown Castle) in the above matter (Petition). I am fully competent to testify to the facts set forth herein, and if called as a witness, would testify to them.

2. I am the Assistant Director of the Planning Division, Fairfax County Department of Planning and Zoning, responsible for the receipt, acceptance, review, approval and recommendations associated with telecommunication applications. I have served in that capacity since January of 2011. In the course of my duties, I routinely accept, analyze, and recommend for approval applications for telecommunications monopoles, towers,

small cells, Distributed Antenna Systems, and other facility co-locations in Fairfax County.

3. In the course of my duties as Assistant Director, I read Crown Castle's Comments submitted in response to the Petition. I am submitting this Declaration to correct several misstatements in Crown Castle's submission.

4. In Tysons, Virginia, located within Fairfax County, new structures are not "prohibited" within the public rights-of-way contrary to Crown Castle's misrepresentation. In fact, County staff has met with Crown Castle representatives five (5) times over the past year to assist them in locating their telecommunication facilities within Tysons' rights-of-way in a manner that is consistent with the County's Comprehensive Plan's Design Guidelines. The Comprehensive Plan was enacted in a public process that requires advertisement of the specific proposals and public hearings as required by state law. The Plan encourages co-location of telecommunications facilities inside and outside of the right-of-way but does not prohibit new structures.

5. Crown Castle was encouraged, but not required, to communicate with the Tysons Corner Land Use Task Force (Task Force) about design options, which Crown Castle refused to do. The County organized this advisory Task Force of representatives from various private commercial sectors, state government, and the community at large to study and report on proposals for Comprehensive Plan provisions in the rapidly developing area of Tysons. The Task Force has a wealth of information to benefit Crown Castle and other entities. However, the County does not *require* any applicants to apply to the Task Force.

6. By email dated July 5, 2016 (attached), the County specifically offered Crown Castle the opportunity to submit applications for multiple facilities simultaneously in one batch to

be considered together and be charged a fee for only one application ("batched application"). Crown Castle is mistaken when it states that Fairfax County would subject each separate facility to a separate special exception process and fee.

7. Further, Virginia's Senate Bill 1282 (2017) (which is expected to take effect July 1, 2017) would require localities to process small cell facilities administratively when the facilities would be installed on an existing structure, such as a utility or light pole, and sets a graduated fee schedule that is capped at $2,000 per batch of applications.

8. Fairfax County received over 650 telecommunications applications from 2010–2016, and denied only 4 of those applications to the best of my knowledge and belief.

9. During the period from 2010–2016, Crown Castle submitted 5 applications for co-locations on utility poles. All 5 applications were accepted, reviewed, and approved within 14–25 calendar days. None of these Crown Castle applications were denied by County staff, the Planning Commission, or the Board of Supervisors.

10. In March of 2016, Crown Castle submitted applications for 19 stand-alone telecommunications poles to be located within the right-of-way in the Tysons area. The County provided comments on the applications to Crown Castle in May, 2016. To date, Crown Castle has not formally responded to the County's comments. Crown Castle requested an extension of the review period, first, until March 15, 2017, and the again until April 15, 2017, in order to pursue other siting options.

11. Fairfax County staff has consistently tried to assist Crown Castle in locating its facilities in Tysons and will continue to do so in the future.

12. In 2016, Fairfax County accepted, reviewed, and approved 80 DAS nodes in 3 batched applications containing 25, 32, and 23 nodes.

13. The Planning Commission and Board of Supervisors collectively complete their review of new telecommunications facilities (i.e., monopoles) within less than 150 days from date of acceptance, unless that time is extended by the applicant. Co-locations reviewed outside the scope of the Spectrum Act (codified at 47 U.S.C. §1455) are processed within 90 days (excluding time tolled by the applicant) and co-locations reviewed under the Spectrum Act are processed within 60 days.

VERIFICATION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief, and that this declaration was executed on April 7, 2017, in Fairfax, Virginia.

Chris Caperton

From: Caperton, Chris B
Sent: Tuesday, July 05, 2016 5:45 PM
To: Butch Salamone (bsalamone@nbcllc.com) <bsalamone@nbcllc.com>
Subject: RE: Special Exception Fee

Butch –
My supervisor informed me that there is still some confusion re how a multiple site DAS such as the one at Tysons would be processed re the SE filing fee. DPZ has indicated to the Board of Supervisors that we will work with applicants to bundle DAS applications so that there is only one SE filing fee.
Thanks C

From: Caperton, Chris B
Sent: Tuesday, July 05, 2016 10:38 AM
To: Butch Salamone (bsalamone@nbcllc.com)
Subject: FW: Special Exception Fee

From: Kirst, Lorrie
Sent: Tuesday, July 05, 2016 10:35 AM
To: Caperton, Chris B
Subject: RE: Special Exception Fee

A fee of $16,375 is correct for a telecommunication SE